

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

TARY HOLCOMB,

Defendant-Petitioner.

Crim. No. 04-80642-D1

District Judge Paul D. Borman
Magistrate Judge R. Steven Whalen

REPORT AND RECOMMENDATION

Petitioner Tary Holcomb has filed two Motions to Vacate Sentence under 28 U.S.C. §2255 [Doc. #360 and Doc. #372], both of which have been referred for Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Because the Sixth Circuit has denied Petitioner authorization to file successive petitions under § 2255, I recommend that both motions be DISMISSED.

I. BACKGROUND

On December 12, 2005, Petitioner pled guilty to Count I of an indictment charging conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 846. On May 25, 2006, the Court imposed a sentence of 120 months (the statutory mandatory minimum), accepting the government's recommendation for a downward departure from the Sentencing Guideline range of 151 to 170 months.

Pursuant to the Rule 11 plea agreement, Petitioner waived his right to appeal. However, on March 21, 2007, he filed a motion to vacate sentence under 28 U.S.C. §2255 [Doc. #283]. I filed a Report and Recommendation that the motion be denied, and on May 30, 2008, District Judge Paul D. Borman accepted my recommendation and denied the

motion [Doc. #341].

The Petitioner filed the present motions to vacate on June 6, 2011 and November 28, 2011, respectively. On June 8, 2011, Petitioner also filed the same motion in the Sixth Circuit, which treated it as a request for permission to file a second or successive petition. On April 3, 2012, a panel of the Sixth Circuit issued an order denying Petitioner leave to file a second or successive petition. *See* Doc. #376.

II. DISCUSSION

28 U.S.C. § 2244(b)(3)(A) provides that “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” Requests to file successive petitions “are exclusively the responsibility of the court of appeals.” *In re Sims*, 111 F.3d 45, 46 (6th Cir. 1997). Here, the Court of Appeals for the Sixth Circuit has denied Petitioner authorization to file successive petitions. This Court therefore does not have the authority to consider either of Petitioner’s § 2255 motions.

III. CONCLUSION

For these reasons, I recommend that Petitioner’s motions to vacate sentence [Doc. #360 and Doc. #372] be DISMISSED.

Any objections to this Report and Recommendation must be filed within fourteen (14) days of service of a copy hereof, including weekends and intervening holidays, as provided for in 28 U.S.C. §636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity will not preserve all the objections

a party might have to this Report and Recommendation. *Willis v. Sullivan*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within fourteen (14) days of service of any objecting party's timely filed objections, including weekends and intervening holidays, the opposing party may file a response. The response shall be not more than twenty (20) pages in length unless by motion and order such page limit is extended by the court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

s/ R. Steven Whalen
R. STEVEN WHALEN
UNITED STATES MAGISTRATE JUDGE

Date: June 13, 2012

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail disclosed on the Notice of Electronic Filing on June 13, 2012.

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s/Johnetta M. Curry-Williams
Case Manager